Office of the Secretary
Marlene H. Dortch
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

RULEMAKING PROCEEDING NO. 18-152

FEDERAL COMMUNICATIONS COMMISSION

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Dear Secretary Dortch:

The law firms Kazerouni Law Group, APC, Hyde & Swigart, APC and Law Offices of Todd M. Friedman, P.C. submit the following comments in response to the petition for rulemaking concerning the interpretation of the Telephone Consumer Protection Act in light of the D.C. Circuit's *ACA International* decision.

I. INTRODUCTION

The Telephone Consumer Protection Act ("TCPA") is an incredibly important consumer privacy statute designed to protect consumers from an alarmingly increasing trend of unwanted and voluminous automated telephone calls. Indeed, Senator Hollings, the TCPA's sponsor, described these calls back in 1991 as "the scourge of modern civilization. They wake us up in the morning; they interrupt our dinner at night; they force the sick and elderly out of bed; they hound us until we want to rip the telephone out of the wall." *Osorio v. State Farm Bank*, F.S.B., 746 F.3d 1242, 1255-56 (11th Cir. 2014), citing 137 Cong. Rec. 30,821 (1991). The TCPA is "aimed at protecting recipients from the intrusion of receiving unwanted communications." *St. Paul Fire & Marine Ins. Co. v. Onvia, Inc.*, 2007 WL 564075, *4 (W.D. Wash. Feb. 16, 2007). Even the U.S. Supreme Court has noted that consumers are outraged over the proliferation of automated telephone calls that are intrusive, nuisance calls, found to be an invasion of privacy by Congress. *See Mims v. Arrow Fin. Servs. LLC,* 132 S. Ct. 740 (2012).

Congress enacted the TCPA in 1991 amidst an unprecedented increase in the volume of phone calls to consumers in America, and the TCPA combats the threat to privacy being caused by the automated calling practices, stating it is unlawful: "(A) to make any call (other than a call made for emergency purposes or made with the prior express consent of the called party) using any automatic telephone dialing system or an artificial or prerecorded voice ... (iii) to any telephone number assigned

to a … cellular telephone service …" 47 U.S.C. § 227(b)(1)(A)(iii) (emphasis added). It is also unlawful to "initiate any telephone call to any residential telephone line using an artificial or prerecorded voice to deliver a message without the prior express consent of the called party." 47 U.S.C. § 227(b)(1)(B). As the Seventh Circuit has explained, there is a "right to be left alone under the TCPA." *Auto-Owners Ins. Co. v. Websolv Computing, Inc.*, 580 F.3d 543, 551 (7th Cir. 2009).

To demonstrate a TCPA violation, an individual need only show that defendant (1) placed a call using an automatic telephone dialing system[1] or with an artificial or prerecorded voice; (2) to any telephone number (in the case of prerecorded voice) or any telephone number assigned to a cellular telephone service (in the case of an ATDS without the requirement of a prerecorded voice message); (3) without the prior express consent of the called party. 47 U.S.C. § 227(b)(1)(A)(iii) and § 227(b)(1)(B).[2]

The Ninth Circuit has held that the TCPA should be analyzed as a content-neutral regulation. *Moser v. F.C.C.*, 46 F.3d 970, 973 (9th Cir. 1995). *See also, Robbins v. Coca-Cola-Company*, 2013 U.S. Dist. LEXIS 72725, *6 (S.D. Cal. May 22, 2013) ("the language of the TCPA [regarding § 227(b)(1)(A)] makes no reference to the time, content, sequence, or volume of calls").

[1] The TCPA's prohibition at issue requires the calls to be made with through an automatic telephone dialing system ("ATDS"), which Congress defines as "equipment which has the *capacity* (A) to store or produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers." 47 U.S.C. § 227(a)(1). The question of whether a dialing system qualifies as an ATDS focusses primarily on the capacity of the dialer.

[2] A single call (or text message) using an ATDS without prior express consent may violate the TCPA. *See Satterfield v. Simon & Schuster, Inc*. 569 F.3d at 946, 956 (9th Cir. 2009).

The Ninth Circuit has defined "express consent" to mean "clearly and unmistakably stated," *Satterfield v. Simon & Schuster, Inc.,* 569 F.3d 946, 955 (9th Cir. 2009). Prior express consent is an affirmative defense for which the TCPA defendant bears the burden of proof. *See Grant v. Capital Management Services, L.P.,* 2011 WL 3874877, at *1, n.1. (9th Cir. Sept. 2, 2011) ("express consent is not an element of a TCPA plaintiff's prima facie case, but rather is an affirmative defense for which the defendant bears the burden of proof"); *Gossett v. CMRE Financial Services*, 142 F.Supp.3d 1083 (S.D. Cal. 2015) (A defendant has the burden of proving it has prior express consent to call).[3]

The TCPA sets statutory damages of $500 per negligent violation and $1,500 per willful or knowing violation, and provides for injunctive relief. 47 U.S.C. § 227(b)(3)(A-B).

As the Supreme Court has noted, "when Congress creates a tort action, it legislates against a legal background of ordinary tort-related vicarious liability rules and consequently intends its legislation to incorporate those rules." *Meyer v. Holley*, 537 U.S. 280, 285 (2003). On May 9, 2013, the FCC issued a Declaratory Ruling,[4] which addressed whether and when the TCPA contemplates indirect liability for unlawful calls made by an independent telemarketer. The FCC held that an entity

[3] If a call "includes or introduces an advertisement" or "constitutes telemarketing," prior express consent must be *written. See* 47 C.F.R. §§ 64.1200(a)(1)(2). The regulation also defines "advertising" and "telemarketing." *See* 47 C.F.R. §§ 64.1200(f)(1)(12). An "advertisement" is "any material advertising the commercial availability or quality of any property, goods, or services." *Id*. § (f)(1). "Telemarketing" is "the initiation of a telephone call or message for the purpose of encouraging the purchase or rental of, or investment in, property, goods, or services, which is transmitted to any person." *Id*. § (f)(12).

[4] The FCC is expressly granted the authority to "prescribe regulations to implement the requirements" of the TCPA. 47 U.S.C. § 227(b)(2).

"may be held vicariously liable under federal common law agency principles for a TCPA violation by a third-party telemarketer." *In the Matter of The Joint Petition Filed by Dish Network, LLC, et al*., CG Docket No. 11-50 (FCC 13-54), 28 FCC Rcd 6574, 6582 ¶ 24 (2013) ("2013 FCC Ruling"). These include agency principles of direct agency, apparent authority and ratification. *Id*. The Supreme Court has held that the TCPA provides for vicarious liability. *Campbell-Ewald Co. v. Gomez*, 136 S.Ct. 663, 673 (2016).

At its root, the TCPA is designed to curtail the volume of unwanted calls that people receive, and provide protections for consumers in preventing such calls from being placed to their phones. The TCPA also provides compensation for automated calls without consent. It is a broad consumer protection statute that is remedial in nature. The TCPA was created to deter the use of automated equipment, which society deems to be an annoyance, and to give consumers reasonable options to protect themselves and one of the most important rights people have as Americans – the right to privacy.

The FCC has recently sought comment from the public on eleven questions, each of which will be addressed below. The undersigned Commenters are class action attorneys who are some of the most frequent practitioners under the TCPA, representing consumers across the United States, and present these comments from a background of having collectively litigated numerous issues under the TCPA in hundreds of actions.

II. COMMENTS ON PROPOSED RULEMAKING UNDER THE TCPA

The FCC seeks comment on numerous topics, most of which stem from the recent D.C. Circuit Court of Appeals decision in the matter of *ACA International, et al. v. Federal Communications Commission and United States of America*, No. 15-1211, 2018 U.S. App. LEXIS 6535 (D.C. Cir. Mar. 16, 2018) ("*ACA International*").

Commenters address these topics, and the appropriate interpretation of the TCPA, as well as the *ACA International* decision in turn.

A. What Constitutes an Automatic Telephone Dialing System?

The scope of the TCPA's definition of "automatic telephone dialing system" (ATDS) is of profound importance to consumers because the TCPA is an essential tool to protect them from tsunamis of unwanted calls to their cell phones. A key preliminary question is the scope and formal effect of *ACA International* on the definition of ATDS—in particular, what FCC orders about the definition of ATDS did the D.C. Circuit set aside? This question is important because the FCC has issued a series of orders about the definition, including orders in 2003 ("the 2003 Ruling"[5]) and 2008 ("the 2008 Ruling"[6]). Among other things, the 2003 Ruling (echoed by the 2008 Ruling) held that a predictive dialer is an ATDS: "Therefore, the Commission finds that a predictive dialer falls within the meaning and statutory definition of 'automatic telephone dialing equipment' and the intent of Congress." As mentioned in the FCC's 2003 ruling, the FCC has been concerned by predictive dialers since 1992. 18 FCC Rcd. 14014, 14021.[7]

ACA International did not overturn FCC rulings on the meaning of an ATDS prior to 2015. *See Reyes v. BCA Fin. Servs.,* No. 16-24077-CIV, 2018 U.S. Dist. LEXIS 80690, at *32 (S.D.Fla. May 14, 2018) ("But the Court finds that the prior

[5] *See In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014, ¶ 165 (2003).

[6] *In re Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 23 FCC Rcd. 559 (2008).

[7] In 1992, the FCC recognized (at least tacitly) the importance of restrictions on equipment such as predictive dialers. *See* FCC Rcd 8752, 8756 (F.C.C. September 17, 1992).

FCC Orders are still binding. Therefore, the *ACA International* case does not change the Court's conclusion on the ATDS issue.")

The TCPA unambiguously[8] defines an ATDS as: "equipment that has the **capacity**--(A) to store **or** produce telephone numbers to be called, using a random or sequential number generator; and (B) to dial such numbers. 47 U.S.C. § 226(a)(1)(A)." (emphasis added). The definition is written in the disjunctive; a telephone system is an ATDS if it has the capacity to store ***or*** produce telephone numbers to be called using a random or sequential number generator. To give meaning to every word in the statute, the phrase "using a random or sequential number generator" must modify "produces numbers" because it makes no sense for a device to "store" numbers using a random or sequential number generator. Years ago, the FCC rejected the argument by ACA International "that a predictive dialer meets the definition of autodialer only when it randomly or sequentially generates telephone numbers, not when it dials numbers from customer telephone lists." 23 FCC Rcd at 566.

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[8] "It is well settled that the starting point for interpreting a statute is the language of the statute itself." *Satterfield v. Simon & Schuster, Inc.*, 569 F.3d 946, 953 (9th Cir. 2009) (quoting *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.,* 484 U.S. 49, 56 (1987) (internal citation and quotation marks omitted)). "The preeminent canon of statutory interpretation requires [a court] to presume that [the] legislature says in a statute what it means and means in a statute what it says there. Thus, our inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *Satterfield*, 569 F.3d 946 at 951 (quoting *McDonald v. Sun Oil Co.,* 548 F.3d 774, 780 (9th Cir. 2008) (quoting *BedRoc Ltd., LLC v. United States,* 541 U.S. 176, 183 (2004))). "[U]nless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Satterfield*, 569 F.3d at 953 (quoting *Perrin v. United States,* 444 U.S. 37, 42 (1979)). As held by the Ninth Circuit Court of Appeals, "the statutory text [of the TCPA] is clear and unambiguous." *Satterfield*, 569 F.3d at 951.

It should also be remembered when defining what constitutes an ATDS that Congress' intent was to limit the ability to place a high volume of calls to people's phones. From a policy standpoint, technology which has the capability of placing significantly more phone calls than traditional rotary or manual dialing methods is very likely an ATDS, because any such system will typically have the capacity to store or generate numbers and dial them from a list. Most modern dialing systems have this capability.

The FCC should not permit companies and individuals, especially in the telemarketing and debt collection industry, to reverse the meaning of an ATDS to limit it to a system that produces (or has the capacity to do so) random or sequential numbers, ignoring the "word" store in the statutory text. Many companies desire the meaning of an ATDS to be limited to random or sequentially generated phone numbers. This would allow them to send thousands of text messages or place thousands of calls daily to known consumer cell phone numbers without needing to obtain prior express consent. If such interpretation were adopted, it would essentially allow anyone to input the phone book into their dialer and SPAM consumers at will without having to obtain any consumer consent.

1. The Initial Inquiry is Whether the Equipment Used has the Requisite *Capacity*, not Whether the Capability was Actually Utilized in Transmission of Calls and Text Messages to Consumers

The TCPA does not define the word "capacity." Consequently, courts and/or the FCC are "required to interpret the word according to its 'ordinary, contemporary, common meaning.'" *Fillichio v. M.R.S. Assocs., Inc.*, No. 09-61629-CIV, 2010 WL 4261442, at *3 (S.D. Fla. Oct. 19, 2010) (quoting *Perrin v. U.S.*, 444 U.S. 37, 42 (1979)). "The Merriam-Webster Collegiate Dictionary defines 'capacity,' as… 'the **potential** or suitability for holding, storing, or accommodating.'" *Discover Prop. &*

Cas. Ins. Co. v. Blair, 2014 U.S. Dist. LEXIS 128029, at *27 (C.D. Cal. Aug. 26, 2014) (quoting Merriam-Webster Collegiate Dictionary 682 at 168 (10th ed. 1997)) (emphasis added). Other dictionary definitions include "the faculty or potential for treating, experiencing, or appreciating" and "the facility or power to produce, perform, or deploy." Merriam-Webster Collegiate Dictionary 682 at 168 (10th ed. 1997)

As held by the Ninth Circuit, the statutory text of the TCPA is "clear and unambiguous," therefore:

> [w]hen evaluating the issue of whether equipment is an ATDS, the statute's clear language mandates that the focus must be on whether the equipment has the *capacity* 'to store or produce telephone numbers to be called, using a random or sequential number generator.' Accordingly, **a system need not actually store, produce, or call randomly or sequentially generated telephone numbers, it need only have the capacity to do it**.

Satterfield, 569 F.3d at 951 (italicized emphasis original; bold emphasis added).

Capacity is inherently a word that contemplate not how something is used, but how it can be used. Whether that means "present" capacity, "latent capacity" or "potential" capacity is up for debate, but there can be no debate that "presently-used functionality" is not included within the definition of "capacity".

The legal inquiry must focus on "whether [the] telephone system… has the requisite capacity to be considered an ATDS under the TCPA," not whether that capacity was in fact utilized in the placement of the allegedly violative calls at issue. *Id*. In other words, whether a dialed telephone number was actually stored or produced using a random or sequential generator is inconsequential, the

unambiguous language of the statute prohibits placing any type of call through the use of a system that has those capabilities.[9]

2. An ATDS includes Equipment that has the *Capacity* to Store Telephone Numbers and to Dial Such Numbers Automatically

Equipment is an ATDS if it has the capacity to automatically dial stored telephone numbers, such as in causing hundreds of calls to be placed or hundreds of text messages to be sent at the press of a button in a short period of time, which is what the FCC has referred to in prior rulings as dialing[10] without human intervention.

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[9] *See In re Jiffy Lube Int'l, Inc.*, 847 F. Supp. 2d 1253 (S.D. Cal. 2012) ("The Ninth Circuit has confirmed that the statute creates liability based solely on a machine's capacity rather than on whether the capacity is utilized.") (citing *Satterfield*, 569 F.3d at 951); *see also Iniguez v. CBE Grp.*, 969 F. Supp. 2d 1241, 1247 (E.D. Cal. 2013) ("whether or not Defendant's system randomly generated Plaintiff's number is not determinative because the TCPA only requires that the system have that capability, not that it was actually utilized with respect to a particular phone call."); *Meyer v. Portfolio Recovery Assocs., Ltd. Liab. Co.*, 707 F.3d 1036, 1043 (9th Cir. 2012) ("[A] system need not actually store, produce, or call randomly or sequentially generated telephone numbers, it need only have the capacity to do it.") (quoting *Satterfield*, 569 F.3d at 951)).

[10] Many TCPA defendants, following issuance of the FCC's July 2015 ruling, have argued that courts must look to whether there is any human intervention in determining whether a system is an ATDS. Some courts have even considered the act of inputting a list (to be autodialed) sufficient human intervention that the system is not an ATDS. *See e.g.*, *Marks v. Crunch San Diego, LLC*, 55 F. Supp. 3d 1288 (S.D. Cal. 2014), on appeal before the Ninth Circuit Court of Appeals, No. 14-56834. That, however, makes no sense, especially where there was evidence that the dialing platform in the *Marks* case (the Textmunication platform) could send "mass texts promoting an event" to consumers' cell phones. The FCC, when referring to human intervention, has tied that phrase to the dialing aspect only, not irrelevant actions that may proceed the actual dialing of the phone numbers. Telephone numbers, especially in the context of predictive dialing, will always need to be added to a list or database by someone, for it is impossible for a machine to create itself and then add phone numbers to a database to be called.

Any inquiry into human intervention is limited to "the *capacity* to dial numbers without human intervention," *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, 2003 FCC LEXIS 3673, *208 (F.C.C. June 26, 2003) (underlining added).

The plain and most reasonable construction of Section 227(a)(1) of the TCPA is one that interprets the definition of ATDS as equipment that has the capacity to: i) store numbers to be called and to dial such numbers automatically; or, alternatively, ii) produce random or sequential numbers to be called and dial such numbers automatically. The focus of § 227(b) of the TCPA is clearly on autodialing. *See In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 7 FCC Rcd 8752, 8781 (F.C.C. September 17, 1992) (referring generally to the "law on autodialing"). Even the relevant statutory headnote of the TCPA which reads: "Restrictions on use of *automated* telephone equipment" (47 U.S.C. § 227(b), italics added).

A practical reading of § 227(a)(1) of the TCPA is that the phrase "using a random or sequential number generator" modifies only the last antecedent "produce telephone numbers to be called," not "to store." Such an interpretation is supported by the nearest-reasonable-referent canon, which provides that, "[w]hen the syntax involves something other than a parallel series of nouns or verbs, a prepositive or postpositive modifier normally applies only to the nearest reasonable referent." *Parm v. Nat'l Bank of Cal., N.A.*, 835 F.3d 1331, 1336 (11th Cir. 2016) (quoting Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 152 (2012)).

Under this reading of the statute, the equipment at issue need only have the ability to store telephone numbers to be called, and to dial such numbers. The narrower interpretation of requiring the storage of telephone numbers using a

random or sequential generator is more difficult to reconcile as noted by the Third Circuit Court of Appeals. *See Dominguez v. Yahoo, Inc.*, 629 F. App'x 369, 372 n.1 (3d Cir. 2015) ("We acknowledge that it is unclear how a number can be *stored* (as opposed to *produced)* using a random or sequential number generator."), as well as by the D.C. Circuit in *ACA International*. It is also unclear how telephone numbers could be *stored* using a *generator*, for number generation is separate from number storage. Even before a dialer may call a generated telephone numbers (whether the numbers are produced sequentially or at random), it must actually store those telephone number, even if only momentarily before the command is given to autodial the phone numbers, which again shows that number production is separate from number storage.

Further, the doctrine of the last antecedent[11] does not lead to a different result because the doctrine "is of no great force," and "the natural and common sense reading of the statute, may overturn it and give it a more comprehensive application." *Buscaglia v. Bowie*, 139 F.2d 294, 296 (1st Cir. 1943) (quoting Lewis, Sutherland Statutory Construction, Vol. 2, § 420).

A broader interpretation is supported by the fact that the "TCPA is a remedial statute and thus entitled to a broad construction." *Mey v. Monitronics Int'l, Inc.*, 959 F. Supp. 2d 927, 930 (N.D.W. Va. 2013) (citing *Holmes v. Back Doctors, Ltd.*, 695 F.Supp.2d 843, 854 (S.D. Ill. 2010) ("It is true that . . . the TCPA is a remedial statute.")). Indeed, the TCPA "should be liberally construed and should be interpreted (when that is possible) in a manner tending to discourage attempted evasions by wrongdoers." *Mey*, 959 F. Supp. 2d at 930 (quoting *Scarborough v. Atlantic Coast Line R. Co.*, 178 F.2d 253, 258 (4th Cir. 1950)); *see also Atchison,*

[11] The doctrine "requires in statutory construction that qualifying words, where no contrary intention appears, be ordinarily applied solely to the words or phrase immediately preceding." *Buscaglia*, 139 F.2d at 296.

Topeka & Santa Fe Ry. Co. v. Buell, 480 U.S. 557, 562 (1987) (holding that when interpreting broad remedial statutes, courts should apply a "standard of liberal construction in order to accomplish [Congress'] objects" (citation omitted)); *E.E.O.C. v. Staten Island Sav. Bank*, 207 F.3d 144, 149 (2d Cir. 2000) ("[I]t is our duty to interpret remedial statutes broadly."). Interpreting the statute broadly by defining an ATDS as equipment that has the capacity to store and dial numbers would discourage attempted violations of the TCPA and protect consumers.

From a common-sense standpoint, and in light of the statutory purpose of the TCPA, there should be a greater emphasis on the capacity of a system to automatically dial numbers that are stored from a list, especially since technology has evolved to the point that dialing random or sequentially generated numbers is of little practical value. Debt collectors and telemarketers do not want to contact people at random, they seek to call targeting and known telephone numbers, often with sophisticated commercial dialing equipment (and increasingly online platforms) that can call thousands of phone numbers a day. *See* 23 FCC Rcd at 566 ("the evolution of the teleservices industry had progressed to the point where dialing lists of numbers was far more cost effective, but that the basic function of such dialing equipment, had not changed--the capacity to dial numbers without human intervention.")

Recently, the court in *Swaney v. Regions Bank,* No. 2:13-CV-00544-JHE, 2015 WL 12751706, at *5 (N.D. Ala. July 13, 2015) opined, based on the 2003 ruling, "By all appearances, the FCC is no longer concerned with whether equipment has the capacity to be programmed for sequential or random dialing when determining if it is an ATDS," 2015 WL 12751706 at *6, and thus "it is reasonable to interpret the 2003 FCC Order as applying beyond the context of predictive dialers," *id*. at *7.

Traditional SMS blasting platforms function by calling telephone numbers in a stored list of databases. An entity or person loads a list of phone numbers into a database, programs the platform to dial those numbers at a certain time (and rate of speed), usually in sequence until the list is exhausted, sets the parameters of the campaign, *e.g*., send text messages during normal business hours, or to send a text message on one's birthday, and presses a button to initiate the campaign which then autodialed the telephone numbers. Thousands of text messages in a short period of time can be sent out to people whose phone numbers get added to a list by companies such as telemarketers and debt collectors. The purpose of the statute is to prevent autodialing of phone numbers unless there is consent, as people typically find these types of calls (automated or prerecorded) annoying and intrusive unless they have expressly consented to them in advance. The harm from annoyance and privacy invasion is increased when it occurs on a large scale.

As noted above, technologically, storage is an entirely separate function from the generation of numbers. In fact, commenters understand, having spoken with experts in the field, that it is not possible for one system to both store and produce numbers, for those two functions are mutually exclusive. If the system already has the numbers in it (stored), then there would be no need for it to produce or generate the numbers. Traditional cannons of statutory construction support a reading of the statute that treats "storage" of telephone numbers separately from "production" of those numbers. Under the Last Antecedent Rule, a limiting clause or phrase "should ordinarily be read as modifying only the noun or phrase that it immediately follows." *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003). Applying this rule to § 226(a)(1)(A), the phrase "using a random or sequential number generator" modifies the word "produce" rather than the word "store."

Some commenters may argue that the Rule of Punctuation trumps the Last Antecedent Rule in this case. The Rule of Punctuation says that where, as in § 226(a)(1)(A), a modifier is set off from the series by a comma, it applies to more than the last antecedent. But punctuation rules should not be applied where applying them distorts a statute's plain meaning. *See U.S. Nat'l Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 459 (1993). However, applying the Rule of Punctuation violates the Rule of Superfluity, which prohibits reading a statutory provision such that any word or phrase is rendered superfluous. *Massle v. U.S. Dept. of Housing & Urban Dev*., 620 F.3d 340, 352 (3rd Cir. 2010). As noted above, storing telephone numbers using a random or sequential number generator is nonsensical. Consequently, if the phrase "using a random or sequential number generator" modifies both "store" and "produce," the term "store" is essentially read out of the statute, becomes superfluous, and the plain meaning of the statute is distorted.

A statutory reading that focuses on storage furthers the policies the FCC has previously articulated, including preventing callers from placing thousands of calls and texts in a short time period or developing equipment that circumvents the plain language and intent of the statute. Focusing on the capacity to "store" numbers also makes it clear that a predictive dialer is an ATDS under the statute even if the predictive dialer relies on lists of numbers to call, as those lists would have to be uploaded and stored before they could be dialed. Although the decisions are few, courts have found that equipment that has the capacity to store numbers in such a manner constitutes an ATDS under the TCPA. *See e.g., Zeidel v. A&M (2015) LLC*, No. 13-cv-6989, 2017 WL 1178150, *8 (N.D.Ill. Mar. 30, 2017) (finding that a text

messaging system could be an ATDS regardless of whether it had the capacity to generate numbers sequentially or randomly, relying on the FCC's 2003 ruling).[12]

Of course, to be an ATDS, the device must not only store the numbers, but must also dial them automatically, so an ordinary smartphone or desk phone that requires a human caller to dial a stored number would not be an ATDS. Even if, *arguendo*, the word "capacity" were broad enough to encompass ordinary smartphones (Congress could not have reasonably foreseen in 1991 the proliferation of today's smartphone now used by millions of average Americans), the FCC could create an exception for calls and text message from consumer-to-consumer using a smartphone. The FCC could exempt calls where the called party is not charged for the call, based on a finding that such calls, if not commercial in nature, do not invade consumer privacy sought to be protected by the TCPA. *See* 47 U.S.C. § 227(b)(2)(C); *see also*, Telephone Consumer Protection Act of 1991, Pub. L. No. 102-243 § 2(13) (1991) (the FCC "should have the flexibility to design different rules for" "automated or prerecorded calls" that are not an invasion of privacy).

[12] *See also, Echevvaria v. Diversified Consultants, Inc*., 2014 WL 929275, at *6 (Feb. 28, 2014) (Mag.) (recommending summary judgment for consumer; system was ATDS where employee loaded 3,500,000 numbers into it each morning, the numbers were stored until midnight, and the system selected numbers to call according to a protocol determined by defendant, even though the system did not have the capacity to store or produce by random or sequential number generation); *Davis v. Diversified Consultants Inc*., 36 F. Supp. 3d 217, 225–26 (D. Mass 2014) (granting summary judgment to plaintiff on issue of whether system was ATDS where system had the capacity to store numbers even though evidence was "murky" regarding whether the system had the capacity for random or sequential number generation); *Carroll v. SGS N. Am., Inc.*, 2017 WL 4183098 (M.D. La. Sept. 21, 2017) (finding sufficient evidence to defeat summary judgment where record showed defendant input and stored numbers in a predictive dialer system).

3. An ATDS also includes Equipment that has the *Capacity* to Produce Telephone Numbers and to Dial Such Numbers Automatically

The statutory definition of ATDS contemplates autodialing equipment that either stores *or* produces numbers. As mentioned above, an interpretation that requires, in every instance, for telephone numbers to be *produced* using a random or sequential generator would read the words "to store" out of the statute. Indeed, the "canon against superfluity instructs that '[i]t is our duty to give effect, if possible, to every clause and word of a statute.'" *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242, 1258 (11th Cir. 2014) (quoting *Duncan v. Walker*, 533 U.S. 167, 174 (2001)). Stated differently, the use of the word "or" indicates the equipment need only store *or* produce telephone numbers to be called, not both store *and* produce such numbers.

Telephone numbers can only be called by a dialer sequentially[13] or randomly, such as calling each number on a list until the list is exhausted or calling numbers on a list no particular order (i.e., randomly). Equipment that dials (stored or generated) telephone numbers automatically, is an ATDS. *See In re Jiffy Lube Int'l, Inc.*, 847 F. Supp. 2d at n. 8 ("[defendant] has also failed to show that a machine which is fed a large list of telephone numbers and then dials them sequentially or randomly…should not be considered an ATDS…. given that such a machine could arguably be said to 'store…telephone numbers to be called, using a random or

[13] The word "sequential" means "of, relating to, or arranged in a sequence," or "following in sequence." Merriam-Webster Collegiate Dictionary at www.merriam webster.com/dictionary/sequential; (last accessed on June 12, 2018). The word "sequence" means an "order of succession." *Id*. at https://www.merriam-webster.com/dictionary/sequence. Present-day text messaging platforms store telephone numbers that are typically uploaded as lists of contacts, and then transmit text messages to those numbers by arranging them in a sequence and dialing the numbers in that order.

sequential number generator.'") (quoting 47 U.S.C. § 227(a)(1)); *Connelly*, 2012 U.S. Dist. LEXIS 81332, at *14 (rejecting defendant's argument that it did not use an ATDS because "the calls were made from an existing list of telephone numbers rather than via a random or sequential number generator…given that such a machine could arguably be said to 'store…telephone numbers to be called, using a random or sequential number generator.'") (quoting *In re Jiffy Lube Int'l, Inc.*, 847 F. Supp. 2d at n. 8).

There appear to be three ways to generate numbers for dialing: (1) manual selection, such as would be done when selecting numbers from a contact list in a cell phone; (2) truly random production performed by a computer; or (3) sequential production performed by a computer. The phrase "using a random or sequential number generator" makes clear that manual selection is not autodialing (such as speed dialing or call forwarding, 7 FCC Rcd 8752), but where the equipment has the capacity to generate random or sequential numbers and to dial such numbers automatically, the equipment is an ATDS.

4. In Plain English, What Does "Capacity" Mean?

A helpful analogy to understanding the word "capacity" is the automobile. What turns a frame, body, chassis and engine combination into an "automobile" is that the interconnectivity between these various components give it the capacity for self-propulsion. An automobile that is turned off and stored in a garage or being pushed down the street is still an automobile. However, a basic frame with no engine and no capacity for self-propulsion is likely not an automobile, it is a wagon or push cart. In this respect, the notion of human intervention comes into focus. What is important for ATDS "capacity" is not whether human intervention was functionally utilized, but rather what level of human intervention is *necessary* to be utilized to dial the phone numbers.

In *ACA International*, the D.C. Circuit grappled with the possibility that an ordinary smartphone might be considered an ATDS under the "Potential Capacity" definition advanced in the FCC's 2015 Order, and the D.C. Circuit included considerable *dicta* in its decision on this point. However, the D.C. Circuit's concerns relating to smartphones could be simply addressed by stating that the autodialing software (system coding) must actually be installed on a smartphone device before it is an ATDS, which is consistent with the meaning of the word "capacity." It is also consistent with the analogy of the engineless car not being an automobile as compared to the vehicle that is simply not turned on and stored in a garage.

This is a common-sense approach. "Capacity" could reasonably be interpreted to mean "latent capacity," which would include predictive dialers that may have the predictive dialing algorithm turned off, temporarily or otherwise.[14] The statute envisions as much due to its purpose to prevent people from using dialing platforms that can (have the capacity to) place high volumes of calls with less effort or expenditure of resources (since calls are annoying). It is also consistent with the plain meaning of the word "capacity."

Commenters respectfully submit that the FCC should adopt a "Latent Capacity" test going forward. Such a test would not depend on whether the calls

[14] "Latent capacity" was the term adopted by the Third Circuit, Ninth Circuit, and other courts. *See Dominguez v. Yahoo, Inc.*, 629 Fed. Appx. 369 (3d Cir. 2014) (device is an autodialer if it is part of a system that has the latent capacity to dial randomly or sequentially generated numbers); *Meyer v. Portfolio Recovery Associates, L.L.C.*, 707 F.3d 1036 (9th Cir. 2012); *Satterfield v. Simon & Shuster*, 569 F.3d 946 (9th Cir. 2009) (reversing grant of summary judgment to advertiser; fact question whether system had capacity to generate random or sequential numbers); *Moore v. DISH Network*, 57 F. Supp. 3d 639 (N.D. W. Va. 2014) (predictive dialer is autodialer if it has capacity to be upgraded by software to store or generate numbers randomly or sequentially; human involvement in inputting the number is irrelevant).

were made using the equipment's automated functionality, because the statute's plain language explicitly uses the term "capacity" not "functionality." Inserting a requirement of functionality into the statute would be outside of the authority of the Commission because the Commission cannot rewrite the express text of the TCPA, and if the Commission were to do so it would not be entitled to *Chevron* deference.

B. How Should The FCC Treat Calls to Reassigned Numbers, and Treat the Term "Called Party"?

As a general matter, calls placed to reassigned numbers without the called party's consent remain illegal, and there is no safe harbor under the TCPA for the first call, or any calls placed to wrong number recipients. *ACA International* addresses this substantive question under the TCPA, and held in no uncertain terms that the adoption of a one free call rule, and implicitly *any* safe harbor rule, was arbitrary and capricious. The decision addressed these two questions separately. First, the court agreed with the FCC and the Seventh Circuit,[15] as well as the Eleventh Circuit,[16] that "[t]he Commission…could permissibly interpret "called party" in that provision to refer to the current subscriber."[17] It described the Seventh Circuit's reasoning at some length:

> The Seventh Circuit explained that the phrase "called party" appears throughout the broader statutory section, 47 U.S.C. § 227, a total of seven times. 679 F.3d at 640. Four of those instances "unmistakably denote the current subscriber," not the previous, pre-reassignment subscriber. *Id.* Of the three remaining instances, "one denotes whoever answers the call (usually the [current] subscriber)," and the other two are unclear. *Id.* By contrast, the court observed, the "phrase 'intended recipient' does not appear anywhere in § 227, so what justification could there be for equating 'called party' with 'intended

[15] *Soppet v. Enhanced Recovery Co.*, 679 F.3d 637 (7th Cir. 2012).
[16] *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242 (11th Cir. 2014).
[17] *ACA International* at *15.

> recipient of the call'?" *Id.* For those and other reasons, the court concluded "that 'called party' in § 227(b)(1) means the person subscribing to the called number at the time the call is made," not the previous subscriber who had given consent.

ACA Int'l, 885 F.3d at 706.

The D.C. Circuit held in *ACA International* that this analysis by the Seventh Circuit was "persuasive" support for the conclusion that the FCC *could* define "called party" to mean the person actually called, even when the number had been reassigned. *Id*. at *15. Regarding the second question, however, the D.C. Circuit found that the FCC's order allowing a one-call safe harbor was arbitrary, saying –

> The Commission's one-call-only approach cannot be salvaged by its suggestion that callers rather than new subscribers should bear the risk when calls are made (or messages are sent) to a reassigned number. That consideration would equally support a zero-call, strict-liability rule.

Id. at *16. As the D.C. Circuit could not be sure that the FCC would have adopted the first part interpreting called party to mean the person reached if the safe harbor was rejected, the court set aside both parts of the FCC's treatment of reassigned numbers. *Id*. at *17.

The plain language of the TCPA contains no safe harbor rule and imposes strict liability for calls that are not deemed to have been "willful" violations. Moreover, there currently exist public databases with information pertaining to the identity of the owner and/or user of a particular phone number.[18] This is one

[18] The FCC could also create a database of reassigned phone numbers which company could periodically check before placing automated calls if they are concerned that they might not have express consent to call that phone number. Also, the company could place periodic live person calls (not using a dialer) to verify consumer consent to be called prior to conducting or resuming autodialer campaigns.

means for class action counsel to determine the identity of class members and provide direct notice when only the telephone number is known by the TCPA defendant. A company who makes an economically sound business decision to hedge their risk could hire staff to cross check such databases before placing calls to numbers that it believes could have been reassigned. If the risk is not worth the expense, then the calling entity assumes that risk. The bottom line is that a company placing the calls is in a better position to evaluate who they are placing calls to than a consumer is in when they receive intrusive calls and have their privacy rights violated. Placing burden on consumers is inequitable, not in line with the purpose or plain language of the statute, and in effect gives companies a free pass.

Separately, the impact of changing the definition of "called party" to mean anything less than the actual person who was called would be a massive blow to privacy rights of consumers. The philosophical debate comes down to where the burden should be placed – on the calling entity or on the consumer who never consented to the phone calls in the first place. Placing the burden on consumers gives companies a free pass.

For instance, in the certified class action of *Caldera v. American Medical Collection Agency*, 320 F.R.D. 513 (C.D. Cal. 2017), which is currently being litigated by undersigned Commentators, the defendant is alleged to have engaged in a practice of skip tracing phone numbers and cold calling these consumers for debt collection purposes using a predictive dialer. Many of these class members were wrong parties who didn't even owe the debt, while others no doubt are debtors (intended recipients) who simply never gave their phone number to the defendant or an original creditor and were dialed without their consent nonetheless. A determination by the FCC that each of these distinct groups of

individuals should legally be treated differently makes absolutely no sense. Both groups were dialed on their phones using an alleged ATDS without prior express consent – that is a violation of the plain language of the TCPA. Their privacy rights were invaded all the same, and from a policy standpoint, suffered the same statutory harm.

Were the FCC to adopt a rule that "called party" does not include wrong number recipients, such a ruling would result in a bizarre conclusion: the same exact conduct, and the same exact privacy invasion would be treated legally differently with respect to people who were called who were not the intended recipient of the phone call versus those who were the debtors that the calling entity was trying to reach. If anything, wrong number recipients suffer an even greater privacy invasion. These individuals do not even owe the alleged debt (in the case of debt collectors calling), and yet the dialing entity would get a free pass to call because they were trying to reach someone else. Respectfully, such a ruling would be beyond arbitrary and capricious.

It would be disastrous to the privacy rights of consumers everywhere, and to class actions generally, where distinguishing between class members and non-class members to give notice required under Federal Rule of Civil Procedure 23 is already challenging enough. Two Circuits (and a number of district courts) had reached the same conclusion without any reliance on the FCC's 2015 order and before the FCC had even issued that order, there is strong and independent precedent that this is the correct interpretation of the TCPA, and reliance on an FCC interpretation is unnecessary.

C. How Should a Called Party Be Permitted to Revoke Prior Express Consent?

ACA International upheld the FCC's ruling that a consumer can revoke prior express consent by "any reasonable means." This is the appropriate standard, which should not be disturbed.

With a few narrow exceptions not relevant here, the TCPA prohibits autodialed or prerecorded calls to cell phones without the called party's prior express consent. In *ACA International*, the D.C. Circuit rejected the petitioners' challenge to the FCC's determination that consumers can revoke their consent by any reasonable means. The decision also has important implications for several other questions about revocation of consent.

This section will address the impact of *ACA International* on the following issues relating to revocation of consent:

- Whether consent can be revoked;
- Whether callers can limit how consent can be revoked;
- Whether consent provided as a term in a contract can be revoked; and
- Whether the method of revoking consent can be limited or controlled by the terms of a contract in which consent was granted.

1. *ACA International* Confirms that Consumers Have the Right to Revoke Consent

The FCC's 2015 ruling unequivocally holds that consumers have the right to revoke previously-given consent to receive robocalls. FCC 2015 Order at § 56. The *ACA International* decision repeats and confirms this rule. The court said "[i]t is undisputed that consumers who have consented to receiving calls otherwise forbidden by the TCPA are entitled to revoke their consent." *ACA International* at

*17. The Third,[19] Ninth,[20] and Eleventh Circuits,[21] and a number of lower court decisions[22] have all agreed. Since *ACA International* disposes of all of the Hobbs Act appeals from the FCC's 2015 order, and sets aside only two parts of that order (both of which relate to matters other than revocation of consent), the FCC's ruling that consent can be revoked is now—absent an appeal to the Supreme Court—final and binding.

2. Callers Cannot Limit How Consent Can Be Revoked

A second important issue resolved by *ACA International* is that callers cannot limit how consent can be revoked. This issue was squarely before the D.C. Circuit, as the petitioners had specifically requested the FCC to rule that callers could "unilaterally prescribe the exclusive means for consumers to revoke consent." *ACA International* at *17. The FCC denied that request, saying that such a rule would "materially impair" the right of revocation. 2015 FCC Order ¶ 66. Instead, the FCC concluded that "a called party may revoke consent at any time and through any reasonable means"—orally or in writing—"that clearly expresses a desire not to receive further messages." *Id*. ¶¶ 47 and 63.

[19] *Gager v. Dell Fin. Services, L.L.C.*, 727 F.3d 265 (3d Cir. 2013).
[20] *Van Patten v. Vertical Fitness Grp*., 847 F.3d 1037, 1047–1049 (9th Cir. 2017).

[21] *Osorio v. State Farm Bank*, 746 F.3d 1242 (11th Cir. 2014). *Accord Schweitzer v. Comenity Bank*, 866 F.3d 1273 (11th Cir. 2017) (reiterating that consent can be revoked orally, and holding that it can be partially revoked).

[22] *Cartrette v. Time Warner Cable, Inc*., 157 F. Supp. 3d 448 (E.D.N.C. 2016); *King v. Time Warner Cable*, 113 F. Supp. 3d 718, 726 (S.D.N.Y. 2015) (applying FCC's 2015 declaratory ruling; consumer's revocation, communicated to caller, was effective); *Conklin v. Wells Fargo Bank, N.A*., 2013 WL 6409731 (M.D. Fla. Dec. 9, 2013); *Munro v. King Broad. Co.*, 2013 WL 6185233 (W.D. Wash. Nov. 26, 2013).

The D.C. Circuit expressly upheld the FCC's decision in this regard. It described the petitioners' concerns as "overstated," and held that the FCC was not required to establish standardized revocation procedures. *ACA International* at *18. Nor did the FCC go beyond its authority by mandating standardized revocation procedures for opting out of time-sensitive banking and healthcare- related messages that the Commission had exempted from the prior express consent requirement yet declining to do so for revocation of consent. *Id*. As the D.C. Circuit pointed out, "the default rule for *non*-exempted calls [*i.e.* calls other than time-sensitive banking and healthcare-related calls] is that they are *disallowed* (absent consent), such that the availability of an opt-out naturally could be broader. In that context, the Commission could reasonably elect to enable consumers to revoke their consent without having to adhere to specific procedures." *Id*.

There is no reason to depart from this prior holding. Consumers need quick and easy ways to put companies on notice that they want to be left alone from automated calls. Forcing consumers jump through hoops will only serve to frustrate the purpose of the TCPA, and increase the number of robocalls by encouraging calling entities to add even more fine print into terms and conditions that consumers rarely read or understand. This is not what is best for the American Public.

3. *ACA International* Lends Additional Support to the View That Consent Provided as a Term in a Contract Can Be Revoked

Recently, many creditors have begun inserting provisions in form contracts purporting to authorize the use of automated equipment to contact consumers at any number furnished by the consumer or otherwise obtained by the creditor. Under the Third Circuit opinion in *Gager v. Dell Financial Services,* this consent can be revoked.[23] By entering into a contractual relationship with a seller, a consumer does

[23] *Gager v. Dell Fin. Services, L.L.C.*, 727 F.3d 265, 273–274 (3d Cir. 2013).

not waive the right to revoke consent to receive autodialed or prerecorded cell phone calls.[24]

However, a 2017 decision from the Second Circuit in *Reyes v. Lincoln Auto. Fin. Services*, erroneously holds that the consumer's consent is irrevocable when it is part of a binding contract—in the particular case, a vehicle lease.[25] That decision fails to give appropriate weight to the FCC's 2015 ruling that, "[w]here the consumer gives prior express consent, the consumer may also revoke that consent."[26] The FCC ruling on this point is unambiguous, and without qualifications or conditions. It cannot be construed as dependent on how consent was originally provided. *ACA International* at *43.

ACA International states, "It is undisputed that consumers who have consented to receiving calls otherwise forbidden by the TCPA are entitled to revoke their consent." *Id*. at *17. Like the FCC's 2015 order, this statement is unambiguous and without qualifications or conditions, so it is further support for the view that a consumer has the right to revoke consent even if consent was provided as part of a contract.

A final issue regarding revocation of consent, mentioned but not resolved in *ACA International,* is whether the *method* of revoking consent can be limited or controlled by the terms of a contract in which consent was granted. As noted in the

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[24] *Id.* at 274. *See also*, *Accord Osorio v. State Farm Bank,* 746 F3d 1242 (11th Cir. 2014); *Cartrette v. Time Warner Cable, Inc*., 157 F. Supp. 3d 448 (E.D.N.C. 2016). *See also Ginwright v. Exeter Fin. Corp.*, 2017 WL 5716756, at *6 (D. Md. Nov. 28, 2017).

[25] *Reyes v. Lincoln Auto. Fin. Services*, 861 F.3d 51 (2d Cir. 2017).

[26] *In re Rules & Regulations Implementing the Telephone Consumer Protection Act of 1991,* No. 02-278, Report & Order, 30 FCC Rcd. 7961, at ¶ 62 (July 10, 2015). *See Ginwright v. Exeter Fin. Corp*., 2017 WL 5716756, at *6 (D. Md. Nov. 28, 2017) (declining to follow *Reyes*; noting its inconsistency with FCC's ruling.).

preceding section, the weight of authority is that consent can be revoked even when that consent has been made a term in a contract, but appellate courts have not yet weighed in on the question whether a contract can impose a specific method of revoking consent.

Nonetheless, *ACA International* is relevant to the question in that it upholds the FCC's ruling that a consumer has the right to revoke consent by any reasonable means. Whether or not a *reasonable* method of revoking consent can be required by contract, it should be clear after *ACA International* that a contract cannot require an *unreasonable* method of revoking consent. For example, a requirement in a contract that only permits revocation of consent in writing, delivered by certified mail to a specific address, would seem to be unreasonable. It would be especially unreasonable if the caller continued to call after hearing the called party's repeated requests to stop calling, and failed to inform the called party during or after those requests of the acceptable method of revocation. Statutory rights granted by federal law generally cannot be contracted away under state law principles, because they create conflicts between state and federal laws, and abridge the rights afforded to all by the United States. There is no reason for the FCC to take any such action at this stage.

D. The FCC Should Not Reconsider Common Law Agency Liability Rules Under the 2013 FCC Order

As the Supreme Court has noted, "when Congress creates a tort action, it legislates against a legal background of ordinary tort-related vicarious liability rules and consequently intends its legislation to incorporate those rules." *Meyer v. Holley*, 537 U.S. 280, 285 (2003). On May 9, 2013, the FCC issued a Declaratory Ruling, which addressed whether and when the TCPA contemplates indirect liability for unlawful calls made by an independent telemarketer. The FCC held that an entity

"may be held vicariously liable under federal common law agency principles for a TCPA violation by a third-party telemarketer." *In the Matter of The Joint Petition Filed by Dish Network, LLC, et al*., CG Docket No. 11-50 (FCC 13-54), 28 FCC Rcd 6574, 6582 ¶ 24 (2013) ("2013 FCC Ruling"). These include agency principles of direct agency, apparent authority and ratification. *Id*. The Supreme Court has held that the TCPA provides for vicarious liability. *Campbell-Ewald Co. v. Gomez*, 136 S.Ct. 663, 673 (2016).

As plaintiffs' counsel in the industry, Commenters have a unique perspective into the trends of the types of robocalls made to consumers' phones. We are often the first people that consumers contact immediately after receiving unwanted robocalls, so we know which types of calls upset consumers most. Commenters can attest that there has been a growing trend of third party "lead generators" who are hired by companies to generate business for them, typically under a performance-based payment contract. The more live transfers and business generated by the lead generator, the more money paid to them by the actual business trying to sell something to the end consumer. Unfortunately, this incentive system leads to a very high incidence of bad acting among lead generators, who are incentivized to reach as many people as possible. The easiest and cheapest way to do this is by using traditional robodialers rather than hire and pay live agents to manually place each of the calls.

Companies who hire these sorts of lead generators try to wash their hands of the conduct, turn a blind eye, don't ask questions, and generally feign ignorance as to how the lead generator was drumming up so much business. More often than not, the lead generator is an offshore company, difficult—if not impossible—to track down and prosecute. Consumers have no redress except to go after the company who did not actually place the calls, but who was directly financially benefitting

from them, and knew or should have known something illegal was probably happening. Hence the 2013 FCC Ruling.

Vicarious liability needs to continue to exist under the TCPA. If vicarious liability is removed from the TCPA, chaos and an ever-increasing number of unwanted robocalls will ensue. There is no reason whatsoever to reduce the protections afforded to consumers under the common law vicarious liability principles, as found in the FCC's 2013 Ruling.

III. CONCLUSION

The TCPA is important to a basic fundamental bipartisan principle that almost every American can support – the right to privacy, including in one's home and in one's cell phone. Noone wants to be robocalled multiple times a day by anyone except perhaps their loved ones, friends or colleagues, unless they have expressly invited such form of contact into their lives. Dialing systems, which are more and more being utilized in the form of online dialing platforms rather than physical dialer machines, that have the capacity to place high volumes of calls (or text messages) should be deemed autodialers because that is what Congress intended, and what the TCPA envisions. Consumers need to be able to protect themselves when enough is enough and they want calls to stop. Revocation needs to be simple and straightforward, not a complex web of boilerplate terms and conditions creating more hoops for people to have to jump through. Companies should not be permitted to hide behind third parties who do their illegal robo-dialing for them, reap the benefits therefrom, and sail into the sunset unscathed.

These are basic principles to which everyone should be able to agree. Yet the TCPA is under attack from the defense bar, the debt collection industry, the telemarketing industry, private interest groups, politicians and the like. The FCC has the power to make common sense rules that protect members of the Public from

intrusions into their rights to privacy. This power should be put to good use, and the common-sense rules advanced herein by Commenters should, respectfully, be adopted.

Respectfully submitted,

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